NO. 81361-2

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH DOUGLAS NETH

Appellant.

RESPONSE TO BRIEF OF AMICUS CURIAE

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1. The limited use of a canine in a public location is not a search pursuant to Article 1, Section 7 of the Washington State Constitution.

2. The issue of reliability of the canine if not properly before this court. However, case law clearly indicates that this and other jurisdictions consider canines reliable.

II. STATEMENT OF THE CASE.

As stated in the Motion on the Merits and in the State's Brief filed in the Court of Appeals, "[T]he State takes issue with some of the facts as set out by appellant; however for purposes of this response the facts are sufficient." Therefore, pursuant to RAP 10.3(b) the state will not submit a separate statement of facts. Where needed the State shall refer to specific additional areas of the record."

III. ARGUMENT

Amicus states that the issue to be addressed is "whether a warrantless canine search of a vehicle violates Article 1, Section 7. Amicus then sets forth "issues" which are raised for the first time on appeal. Amicus addresses the reliability of narcotics dogs in general; an issue that was not raised at the time of trial or on appeal.

The only reference to reliability of canines was when the trial court removed the results of the canine sniff prior to upholding the search warrant. This case was certified by this Court from the Court of Appeals.

The parties addressed, to a certain extent, the search issue now posed by this court. They have not had occasion to address the "issue" of reliability that was raised for the first time by amicus ACLU.

This court has held that the court need not consider an issue raised for the first time by amicus. State v. Gonzalez, 110 Wn.2d 738, 752 n.2, 757 P.2d 925 (1988):

> ... we have many times held that arguments raised only by amici curiae need not be considered. E.g., Coburn v. Seda, 101 Wn.2d 270, 279, 677 P.2d 173 (1984); Washington State Bar Ass'n v. Great Western Union Fed. Sav. & Loan Ass'n, 91 Wn.2d 48, 59-60, 586 P.2d 870 (1978); Long v. Odell, 60 Wn.2d 151, 154, 372 P.2d 548 (1962). This principle is especially applicable where, as here, the issue being raised has not been adequately briefed.
> ...
> See Meyer v. UW, 105 Wn.2d 847, 855, 719 P.2d 98 (1986); United States v. Phillips, 433 F.2d 1364, 1366 (8th Cir. 1970) ("[N]aked castings into the constitutional sea are not sufficient to command judicial consideration and discussion.")

It is the State's position that the Court should not address the "issue" of reliability.

This matter arose from a valid stop; RCW 46.61.021(2) clearly allowed such a stop based on the Troopers observation that Neth was exceeding the speed limit. This law allowed the Trooper to detain Neth for the traffic infractions "for a reasonable period of time necessary to identify the person, check the status of the person's license, insurance identification card, and the vehicle's registration, and complete and issue a notice of traffic infraction."

Neth complied with the law and stopped his vehicle. This occurred in a public parking lot. It was during this contact in the parking lot of "the Chevron gas station" that the canine was allowed to sniff the exterior of the vehicle that Neth was driving. (RP 44) The facts indicate that the entire stop took approximately one hour (RP 9); that Neth could not prove ownership of the car (RP 6,77,82); that there elapsed approximately 20-30 minutes from the initial stop to the time that the canine arrived and that Neth was released from custody prior to the canine sniffing the car. (RP 8)

Under the Washington Constitution, police activity constitutes a search if it unreasonably intrudes into a person's "private affairs." This analysis "focuses on those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant." State v. Myrick, 102 Wn.2d 506, 210-11, 688 P.2d 151 (1984). In applying this test, this court has applied a historical analysis.

For example, this court has determined that telephone numbers, garbage, and power records are constitutionally protected. In each of these cases, the court relied on historical privacy protections, whether statutory or common-law. State v. Gunwall, 106 Wn.2d 54, 66, 720 P.2d 808 (1986) ("The long history and tradition of strict legislative protections of telephonic and other electronic communications in this state support our decision"); State v. Boland, 115 Wn.2d 571, 576, 800 P.2d 1113 (1990) ("One can reasonably infer from these ordinances that only trash collectors and not others will handle one's trash"); In re Maxfield, 133 Wn.2d 332,

341-42, 45 P.2d 196 (1997) ("both this state's case law and statutes recognize a privacy interest in electric consumption records").

Conversely, this court held that the sleeping compartment of a tractor trailer was not entitled to constitutional protection beyond that attached to the vehicle. In reaching this conclusion, the court looked at the State's long history of regulating vehicles on public highways. State v. Johnson, 128 Wn.2d 431, 445-46, 909 P.2d 293 (1996). Similarly, this court held that the use of a flashlight was not a search, because a flashlight is "a device that is commonly used by people in this state." State v. Rose, 128 Wn.2d 388, 399, 909 P.2d 280 (1996).

The ACLU amicus brief totally lacks this kind of historical analysis. The brief claims that dogs are analogous to the new technological device discussed in State v. Young, 123 Wn.2d 173, 867 P.2d 593 (1994). It cites only one case in which use of a dog was held to constitute a search: State v. Dearman, 92 Wn. App. 630, 962 P.2d 850 (1998), review denied, 137 Wn.2d 1032 (1999). As they acknowledge, prior case law was to the contrary. State v. Stanphill, 53 Wn. App. 623, 769 P.2d 861 (1989); State v. Boyce, 44 Wn. App. 724, 723 P.2d 28 (1986); State v. Wolohan, 23 Wn. App. 813, 598 P.2d 421 (1979), review denied, 93 Wn.2d 1008 (1980). From reading the brief, one might think that a dog is a new device that was developed in the late 1970s.

Of course, this is far from the truth. Rather, the olfactory abilities of dogs have been recognized throughout recorded history. Dogs have

long been used in law enforcement to track criminals. They have also been used to track fugitives of all kinds, whether soldiers, rebels, or escaped slaves. See State v. Hall, 4 Ohio Dec. 147 (Com. Pleas 1896) (discussing history of tracking by bloodhounds).

The citizens of Washington Territory and early Washington State were doubtless aware of these facts. They knew that dogs could be used to discover things and people that were hidden. They knew that this ability had historically been used as an instrument of government by beneficent and tyrannical rulers alike. Had the people considered this to be a threat to their privacy or liberty, they would have taken steps to protect themselves against it, whether by statute or case law.

There is, however, no evidence of any such protection for a century after the Washington Constitution was adopted. There are and have been numerous statutes dealing with dogs. Some protect the dogs themselves against cruelty. See RCW ch. 16.52. Some protect the right of handicapped individuals to the assistance of service dogs. See RCW ch. 70.84. Some protect the public against dangerous dogs or those that carry communicable diseases. See RCW ch.16.08, 16.70. Some deal with licensing of dogs and regulation of stray dogs. See RCW 25.27.010(7), ch. 16.10, ch. 36.49. Some deal with the protection of wildlife against dogs and the use of dogs in hunting. RCW 77.12.315, 77.15.240. There is, however, not a single statute that seeks to protect citizens from the use of dogs' olfactory abilities.

Nor is there any early case law recognizing such protection. Until 1979, it does not appear that anyone even suggested that the use of a dog's nose constituted an invasion of privacy. That year, the Court of Appeals held in Wolohan that the use of a dog to smell luggage in a public place did not violate any legitimate expectation of privacy. During the next 10 years, the court twice reached similar conclusions, in Boyce and Stanphill. It was not until 1998 that a court first reached a contrary conclusion in Dearman -- almost 20 years after the issue was first raised in Washington, and almost 100 years after the Washington constitution was drafted.

This history demonstrates that protection against a dog's sense of smell is not part of the "privacy interests which citizens of this state have held ... safe from governmental trespass absent a warrant." Rather, dogs have long been a routine and legitimate tool of law enforcement. The citizens of Washington have apparently believed that the natural and inherent limitations on a dog's abilities constitute a sufficient protection for their privacy. It has been less than 10 years since a Washington court first held to the contrary, in Dearman. This court should repudiate that decision and return to its common law traditions.

Amicus claims that dogs are similar to the thermal imager discussed in Young. This analogy is faulty. A thermal imager is a new and sophisticated thermal device, available to few people. Even in their current state, they can see into a home to obtain private information. They are also subject to technological advancement that could render them even

more sophisticated. This court viewed a thermal imager as a "particularly intrusive method of surveillance." Because of the possibility of further technological advances, the court was unwilling to "[tie] our right to privacy to the constantly changing state of technology." Young, 123 Wn.2d at 183-84.

In each of these respects, dogs are entirely different. The association between people and dogs is older than recorded history. Dogs are widely available to Washington citizens. Although dogs can be trained to respond to different odors, their inherent abilities have not changed and are not likely to. The information that a dog can obtain is extremely limited:

> The use of trained dogs to detect the odor of marijuana poses no threat of harassment, intimidation, or even inconvenience to the innocent citizen. Nothing of an innocent but private nature and nothing of in incriminating nature other than the narcotics being sought can be discovered through the dog's reaction to the odor of the narcotics. Wolohan, 23 Wn. App. at 820, quoting People v. Campbell, 67 Ill. 2d 308, 367 N.E.2d 949, 953-54 (1977), cert. denied, 435 U.S. 942 (1978).

In each of these respects, a dog more closely resembles the flashlight that was considered in Rose:

> A flashlight is an exceedingly common device; few homes or boats are without one. It is not a unique intrusive device used by police officers to invade the privacy of citizens, and is far different from the device at issue in [Young]. In Young, we held that the use of an infrared device to detect heat patters in the home, which could not be detected by the naked eye or other senses, and which could in effect

> enable the officer to "see through the walls" of the home, was a particularly intrusive method of viewing which went well beyond more enhancement of normal senses. A flashlight, in contrast, does not enable an officer to see within the walls or through drawn drapes. Instead, it is a device commonly used by people in this state. . . Rose, 128 Wn.2d at 399.

Similarly, dogs are commonly used by many Washington citizens, both for their sense of smell and for other purposes. They do not allow anyone to see though walls. They do enhance the senses (as a flashlight does), but only by allowing the dog's natural sense of smell to be substituted for the handler's. Like a flashlight, the common use of a dog's natural senses does not constitute an "intrusive method of viewing" that invokes constitutional protections.

In Young, this court has held that the Constitution protects citizens from new, sophisticated, and intrusive methods of surveillance. That holding does not require constitutional protection from a common "device" that has been used for law-enforcement purposes throughout history. If the citizens of this State wish to be protected from the olfactory senses of dogs, they or their representatives can enact legislation to provide that protection. Such protections have been enacted many times. See, e.g., RCW ch. 9.73 (protecting private communications against interception and recording), 10.79.060-.170 (limiting strip searches), ch. 70.02 (protective privacy of health care information). There is no need for

this court to interfere with democratic processes by creating protections that the citizens have never considered necessary.

Neth enjoyed no reasonable expectation of privacy in the limited information revealed by the canine sniff. Government conduct may violate Article 1, section 7 only if it reveals information in which an individual has "a reasonable privacy expectation." Settled law holds, and Neth does not contest, that persons have no reasonable expectation of privacy in the possession of contraband. See Caballes, 125 S. Ct, at 837 (A.4); United States v. Jacobsen, 466 U.S. 109, 123 (1984); A sniff by a trained drug-detection dog "discloses only the presence or absence of narcotics, a contraband item." United States v. Place, 462 U.S. 696, 707 (1983); accord, City of Indianapolis v. Edmond, 531 U.S. 32, 40 (2000). Accordingly, the canine's sniff did not impinge upon any reasonable expectation of privacy Neth might have had, and thus could not possibly have violated the Article 1, section 7.

It bears mention that the information revealed by the canine's sniff -- the presence or absence of narcotics in defendant's car -- is not among the matters protected by Article 1, section 7. See generally Kyllo v. United States, 533. U.S. 27, 29, 36 n.3, 38 (2001) (holding that "the use of a thermal-imaging device aimed at a private home from a public street to detect relative amounts of heat within the home constitutes a 'search' within the meaning of the Fourth Amendment," because it may reveal entirely lawful activities such as the movement of individuals and "what

hour each night the lady of the house takes her daily sauna and bath"). The information revealed by the sniff of a trained drug-detection dog bears no relationship to the concerns addressed in State v. Young, supra. at 184;

> The device discloses information about activities occurring within the confines of the home, and which a person is entitled to keep from disclosure absent a warrant. Thus, this information falls within the "private affairs" language of Const. art. 1, SS 7..... [t]he infrared thermal detection investigation represents a particularly intrusive method of surveillance which reveals information not otherwise lawfully obtained about what is going on within the home.

The pivotal case is Illinois v. Caballes, 543 U.S. 405, 125 S.Ct. 834, 160 L.Ed.2d 842, vacated and remanded (2006). The state court on remand, determined that the use of a canine was not a search, that court also considered an amicus brief by the ACLU challenging the reliability of canines, Illinois v. Caballes, 221 Ill.2d 282, 329-336, 851 N.E.2d 26, 303 Ill.Dec. 128, (2006):

> In the present case, we are asked to determine whether having an officer circle a vehicle in the company of a trained narcotics-detection dog, while the dog sniffs the air in an effort to detect the presence of contraband, invades the zone of privacy established by article I, section 6. Defendant would have us treat the dog sniff as more like the taking of a physical specimen for analysis (as in Will County Grand Jury) than the performance of a routine pat-down (as in Mitchell) because it involves the government's use of a "device" that enhances ordinary human sensory perceptions.
>
> The State responds that the dog sniff took place in the course of a routine traffic stop and is properly analyzed under traditional search and seizure

principles, without any need to consider the privacy clause.

...

Indeed, once the dog sniff has been conducted, no search will ensue unless the dog alerts to the scent of illegal narcotics. Thus, the image suggested by amicus ACLU of the police searching an individual's luggage by the side of the road and exposing private matters to public view will not occur unless a dog sniff has revealed the presence of illegal narcotics. A person who chooses to transport contraband in his vehicle, knowing that its presence may be detected by a canine unit if he commits a traffic violation, has taken the risk of exposure during the ensuing search of whatever private materials he may have with him in the vehicle.

We conclude that the dog sniff of a vehicle does not constitute an invasion of privacy. It is, in fact, even less invasive or intrusive than the routine pat-down which, after all, involves the officer's physical contact with the clothing of the individual. .... The sniff did not violate defendant's right to be free from unreasonable search and seizure. See Caballes, 543 U.S. at 409, 125 S.Ct. at 838, 160 L.Ed.2d at 847 ("the use of a well-trained narcotics-detection dog-one that 'does not expose noncontraband items that otherwise would remain hidden from public view'-during a lawful traffic stop, generally does not implicate legitimate privacy interests" cognizable under the fourth amendment), quoting United States v. Place, 462 U.S. 696, 707, 103 S.Ct. 2637, 2644, 77 L.Ed.2d 110, 121 (1983).

...

The Supreme Court has "treated a canine sniff by a well-trained narcotics-detection dog as
'sui generis' because it 'discloses only the presence or absence of narcotics, a contraband item.' " Caballes, 543 U.S. at 409, 125 S.Ct. at 838, 160 L.Ed.2d at 847, quoting Place, 462 U.S. at 707, 103 S.Ct. at 2644, 77 L.Ed.2d at 121. Such use of narcotics-detection dogs by the police has been described as a "binary search" or a "content-discriminating" search, because it yields only a yes-or-no answer, not an inventory of the contents of the vehicle or container being searched.

> See *R. Simmons, From Katz to Kyllo: A Blueprint for Adapting the Fourth Amendment to Twenty-First Century Technologies, 53 Hastings L.J. 1303, 1348 (2002)*. In contrast, a technology or procedure that not only discloses criminal activity, but also lawful activity, is not content-discriminating. Use of such technology constitutes a search and, therefore, must pass muster under the fourth amendment. Thus, in Kyllo, 533 U.S. at 34-35, 121 S.Ct. at 2043, 150 L.Ed.2d at 102, the Court held that the use of a thermal-imaging device to detect the presence of marijuana plants inside a home constituted an unlawful search. Because the device also revealed intimate details of conduct inside the home, such as "at what hour each night the lady of the house takes her daily sauna and bath," use of the device violated the occupants' legitimate expectation of privacy. Kyllo, 533 U.S. at 38, 121 S.Ct. at 2045, 150 L.Ed.2d at 105.

See also, State v. Yeoumans, 144 Idaho 871, 172 P.3d 1146. 1148-50 (2007):

> A canine sniff of an automobile is not itself a search that implicates a privacy interest, and thus it need not be justified by suspicion of drug activity, Illinois v. Caballes, 543 U.S. 405, 408, 125 S.Ct. 834, 837, 160 L.Ed.2d 842, 847 (2005); State v. Martinez, 136 Idaho 436, 442, 34 P.3d 1119, 1125 (Ct.App.2001).

In the extensive research that was conducted after this court certified this case and subsequent to the filing of the amicus brief the State has yet to find any jurisdiction that requires the use of a search warrant to authorize the use of a canine in a factually similar setting.

Amicus claims that a search warrant is needed prior to the use of a canine and yet they can cite no case from any of the fifty states nor from any federal jurisdiction that supports such a request. Amicus fails also to

cite to any case that would support the claim that canine's are inherently unreliable and instead "cites" to news paper articles, news reports and its 'own" investigation "[a]lthough both the sampling and record keeping are incomplete..."

As stated in State v. Vrieling, 144 Wn.2d 489, 28 P.3d 762 (2001) this court has indicated that vehicles, even a vehicle that might be used as a residence has a lessened expectation of privacy:

> In State v. Johnson, 128 Wn.2d 431, 909 P.2d 293 (1996), this court was asked to decide whether a sleeper compartment in the cab of a tractor trailer was part of the passenger compartment subject to search incident to the driver's arrest. The defendant in Johnson claimed that the sleeper was his temporary residence, and as such was not subject to search incident to arrest. We rejected this argument, noting that the sleeper compartment was not really a home. Id. at 448. We also observed that the defendant was asking this court to retreat from Stroud and "return to the confusion of Ringer." Id. We declined to do so. We noted that "[v]ehicles traveling on public highways are subject to broad regulations not applicable to fixed residences," which do not afford the defendant the "same heightened privacy protection in the sleeper that he would have in a fixed residence or home." Id. at 449. Finally, we quoted with approval the reasoning of the Court of Appeals:

See also, State v. Branch, 177 N.C.App. 104, 108, 627 S.E.2d 506 (2006):

> [T]he use of a well-trained narcotics-detection dog-one that "does not expose noncontraband items that otherwise would remain hidden from public view," Place, 462 U.S., at 707, 103 S.Ct. 2637, 77 L.Ed.2d 110-during a lawful traffic stop, generally does not implicate legitimate

> privacy interests. In this case, the dog sniff was performed on the exterior of respondent's car while he was lawfully seized for a traffic violation. Any intrusion on respondent's privacy expectations does not rise to the level of a constitutionally cognizable infringement.

In State v. Teagle, 217 Ariz. 17, 170 P.3d 266, 274, 516 Ariz. Adv. Rep. 18 (2007), the Arizona court considers both the duration of a stop such as before this Court as well as indicating that this use of a canine does not amount to a search:

> One hour and forty minutes elapsed from the time Officer Greene radioed the DPS dispatcher requesting a drug-detection dog until it arrived on the scene. Such a substantial amount of time for an investigative detention merits scrutiny; however, "[t]he permitted duration of a Terry-stop cannot be measured by the clock alone." Carter v. State, 143 Md.App. 670, 795 A.2d 790, 803 (2002).
>
> Instead, as explained in United States v. Sharpe, 470 U.S. 675, 105 S.Ct. 1568, 84 L.Ed.2d 605 (1985), whether the length of a particular detention is reasonable under the Fourth Amendment is measured by balancing the degree of intrusion on the individual's privacy against the societal need that justifies the intrusion:
>
> ...
>
> FN7. The canine investigation of the exterior of defendant's vehicle was not a "search" under the Fourth Amendment. Illinois v. Caballes, 543 U.S. 405, 408-09, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005); see also State v. Weinstein, 190 Ariz. 306, 310, 947 P.2d 880, 884 (App.1997). Once the dog alerted outside the vehicle, the police officers had probable cause to search the entire car. Weinstein, 190 Ariz. at 310-11, 947 P.2d at 884-85.

See also, State v Carlson, 102 Ohio App.3d 585, 657 N.E.2d 591 (1995):

> In Shook, we specifically addressed this issue based on United States v. Place (1983), 462 U.S. 696, 103 S.Ct. 2637, 77 L.Ed.2d 110. In Place, the Supreme Court held that the exterior canine sniff of an item located in a public place, in that case luggage, did not constitute a search within the meaning of the Fourth Amendment. In applying Place to the investigative stop of an automobile, we found that because a dog sniff is not a search under the Fourth Amendment, "both Ohio and federal courts have [concluded] that 'an individualized reasonable suspicion of drug-related criminal activity is not required when the dog sniff is employed during a lawful seizure of the vehicle.' " Shook at 7-8, quoting United States v. Morales-Zamora (C.A.10, 1990), 914 F.2d 200, 203.FN3
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> FN3. Accord State v. Palicki (1994), 97 Ohio App.3d 175, 180-181, 646 N.E.2d 494, 497-499; State v. Riley (1993), 88 Ohio App.3d 468, 475-476, 624 N.E.2d 302, 306-308; Bloomfield, 40 F.3d at 915; United States v. Seals (C.A.5, 1993), 987 F.2d 1102, 1106.
> In other words, if a vehicle is lawfully detained, an officer does not need a reasonable suspicion of drug-related activity in order to request that a drug dog be brought to the scene or to conduct a dog sniff of the vehicle

III. CONCLUSION

The use of a canine to sniff a vehicle being operated on a State highway, that when stopped is standing in a public location such as in Neth's case is not a search under Article 1, Section 7 of the Washington State Constitution.

Neth was legally stopped for a traffic violation based upon observation of the Trooper. Thereafter, the Trooper obtained information that was such that he believed that the use of a trained canine "drug" dog

would assist in his investigation. Neth was not in custody at the time of the sniff by the canine. He was not physically restrained and upon completion of the citations he was free to leave. The trooper stated that Neth was released from custody prior to both the dog sniff and the issuance of the infractions.

The law allows for intrusion by the government in factual situations such as this based on several factors, the most important being that the location of the search was a public location, open to any and all; the "intrusion" into the right to privacy of Neth were minimal at the most; the canine is capable of only detecting those items that are contraband, items that are highly regulated by the State and are also items that the "ordinary" citizen can not possess and therefore Neth had no right to privacy in those items; the object that was searched, an automobile, while having a heightened expectation of privacy in this State none the less is not akin to a person's home and therefore the standards set forth in Young are not applicable.

The State agrees that Article 1, Section 7 of the Washington State Constitution affords the residents of this State a heightened level of protection. However, in this instance it is the position of the State that the actions of the officers throughout their contact with Neth and his vehicle, did not amount to a search and that therefore the standards set forth in Illinois v. Caballes, supra., should be adopted by this court.

Finally, the question that has not been asked but needs to be, is there need for further clarification of this issue? A historical review of cases from the Courts of Appeal and this Court would appear to indicate that there has rarely been a question raised with respect to the use of canines. This Court is well aware that appellate counsel would raise this issue if it had been or has become an issue that needs further clarification.

It is clear from the facts of this case, as well as all other cases that the State can find, that the officers who make use of canines do so with the Constitution, which they have sworn to uphold, in mind. There is no indication, as amicus would have this court believe, that there has ever been nor will there be a rush by these officers to run amok with canines. They support the Constitution; they do not look for ways to circumvent it.

Use of canines in search situation is limited both by this respect for the law and the simple fact that this is a scarce resource that is used sparingly and with the rights of the citizens of this State taken into consideration. Officers have clearly only made use of this resource in situations were it was appropriate.

Respectfully Submitted,
This 3rd day of June, 2008

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